Supreme Court, U.S.
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No. 01-52

In The

Supreme Court of the United States

PACIFIC FISHERIES CORP.,

Petitioner,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-MAT, HARLOCK WILLIAMS LEMON, LTD., corporations,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this court should use its supervisory power to direct the United States District Court to vacate its order striking petitioner's jury demand and set the matter for a jury trial in the petitioner's action against H.I.H. in light of the Ninth Circuit courts' approach to jury waivers under Fed.R.Civ.P. 81(c), the Ninth Circuit Court's approach to the issue is consistent with the Supreme Court's precedents and is not in conflict with the other circuits.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT OF CERTIORARI 1

I. PETITIONER'S APPEAL AFTER A TRIAL ON THE MERITS SHOULD BE DISFAVORED 1

II. REVIEW BY THE SUPREME COURT IS NOT APPROPRIATE BECAUSE THE NINTH CIRCUIT'S APPROACH IS NOT IN CONFLICT WITH THE OTHER CIRCUITS 2

A. The Ninth Circuit Rule 2

B. Ninth Circuit Rule Is Not In Conflict With The Other Circuits 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965) 7

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) 3

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977) 2

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 1

Bush v. Allstate Insurance Co., 425 F.2d 393 (5th Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970) 6

Cascone v. Ortho Pharmaceutical Corporation, 702 F.2d 388 (2nd Cir. 1983) 5

Chandler Supply Co. v. GAF Corp., 650 F.2d 983 (9th Cir. 1980) 3

Daniel Intern. Corp. v. Fischback and Moore, Inc., 916 F.2d 1061 (5th Cir. 1990) 5

Fredieu v. Rowan Companies, Inc., 738 F.2d 651 (5th Cir. 1984) 6

Ketchen v. Chippewa Valley Schools, 825 F.2d 1004 (6th Cir. 1987) 7

Kletzelman v. Capistrano, 91 F.3d 68 (9th Cir. 1996) 3

Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983) 2

Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir. 1980) 6

TABLE OF AUTHORITIES – Continued

Page

Malbon v. Pennsylvania Millers Mutual Ins. Co., 636 F.2d 936 (4th Cir. 1980) 7

Mardesich v. Marciel, 538 F.2d 848 (9th Cir. 1976) 3

Merrit v. Faulkner, 697 F.2d 761 (7th Cir. 1983) 6

Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198 (6th Cir. 1986) 7

Mondor v. United States District Court, 910 F.2d 585 (9th Cir. 1990) 2, 3

Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987) 7

Nissan Corp. in U.S.A. v. Burciaga, 982 F.2d 408 (10th Cir. 1992) 6

Noonan v. Cunnard Steamship Co., 375 F.2d 69 (2nd Cir. 1967) 5

Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983) 2

Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983) 7

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) 4

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) 3

RULES:

Fed.R.Civ.P. 81(c) 1, 2, 4

Fed.R.Civ.P. 38(b) 4, 7

Fed.R.Civ.P. 39(b) 3, 7

STATEMENT OF THE CASE

Petitioner made an untimely request for a jury trial under the Federal Rule of Civil Procedure 81(c). Petitioner admitted that the only reason for untimely request was inadvertence of counsel based on his misreading of the rule. The District court ruled that inadvertence of counsel could not support an untimely request under Rule 81(c). This conclusion was affirmed by the Ninth Circuit Court of Appeals.

The parties then tried the case on the merits to the trial court without a jury, and judgment was entered against the Petitioner on all of its claims. The Petitioner appealed to the Ninth Circuit Court of Appeals, and the appeal was denied.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S APPEAL AFTER A TRIAL ON THE MERITS SHOULD BE DISFAVORED

The petitioner claims that the district court improperly denied its jury demand. Rather than file a writ of mandamus, however, the Petitioner went through a full trial on the merits and appealed only when it lost at trial.

This court has long established that a writ of mandamus is a proper way to compel the lower court to conduct a jury trial: "Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The Ninth Circuit approach

follows the long-standing opinions of the Supreme Court. It is well settled in the Ninth Circuit that a writ of mandamus is a proper remedy where petitioner seeks to compel the lower court to grant a jury trial. *Mondor v. United States District Court*, 910 F.2d 585 (9th Cir. 1990), *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983); *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

This court should look with disfavor on appeals made after a trial on the merits where the right to appeal by writ of mandamus before trial is well established.

II. REVIEW BY THE SUPREME COURT IS NOT APPROPRIATE BECAUSE THE NINTH CIRCUIT'S APPROACH IS NOT IN CONFLICT WITH THE OTHER CIRCUITS.

The Ninth Circuit is not "out of step" with the other circuits in its treatment of the late demands for a jury trial. The Ninth Circuit follows the Federal Rule of Civil Procedure 81(c) in determining whether a party properly demanded a trial by jury upon removal from a state court. There is no case in any of the circuits that has held that a trial court should grant an untimely jury demand based upon inadvertence of counsel.

A. The Ninth Circuit Rule.

The Ninth Circuit rule followed by the district court in this case is set forth in *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983):

> The district court, in its discretion, may order a jury trial on a motion by a party who has not filed a timely demand for one. F.R.Civ.P 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Chandler Supply Co. v. GAF Corp.*, 9 Cir., 1980, 650 F.2d 983, 987; *Mardesich v. Marciel*, 9 Cir., 1976, 538 F.2d 848, 849.

See also *Kletzelman v. Capistrano*, 91 F.3d 68 (9th Cir. 1996).[1]

The Ninth Circuit's approach reflects the Supreme Court's notion that the interpretation of a rule should not be expanded when the language of the rule plainly expresses a limitation. *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). The Supreme Court stated that "Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for participating litigants. . . . [S]trict adherence to the procedural requirements . . . is the best guarantee of evenhanded administration of the law." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

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[1] Petitioner claims a conflict in the Ninth Circuit based on *Mondor v. United States District Court for Central District of California*, 910 F.2d 585 (9th Cir. 1990). The court simply found the rule did not apply because the plaintiff had made a jury demand in the state court complaint, which was filed in the record of the federal court. Petitioner here made no such demand.

Federal Rule of Civil Procedure 81(c) provides that Rule 38(b) applies to jury demands in removed actions where responsive pleadings have not been filed prior to removal. Federal Rule of Civil Procedure 38(b) provides that a party seeking to have a disputed issue tried before a jury must serve "upon other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Both rules plainly establish limitations and procedural requirements for a jury demand in removed actions. If the plain meaning of the Federal Rules of Civil Procedure is clear, that meaning is conclusive. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Federal Rule of Civil Procedure 81(c) is clear and conclusive.

B. Ninth Circuit Rule Is Not In Conflict With The Other Circuits.

Petitioner misstates the holdings of a number of cases from other circuits for the proposition that the Ninth Circuit rule is contrary to the law in the other circuits. In those cases cited by Petitioner from the Second, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, the courts actually stated their agreement with the Ninth Circuit rule at issue. In the cases cited by the Petitioner from the First, Sixth and Tenth Circuits, the courts did not indicate a disagreement with the Ninth Circuit rule, and decided the cases on facts other than inadvertence of counsel. None of the appellate cases cited by the petitioner suggested that, where mere inadvertence of counsel is the

basis for missing the deadline, the trial court should exercise discretion to grant a jury trial. There is no conflict amongst the circuits on this issue.

The Second Circuit rule on point was established in *Noonan v. Cunnard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967), holding that inadvertence of counsel was not a basis for allowing an untimely jury demand. In its most recent reference to that rule, in *Cascone v. Ortho Pharmaceutical Corporation*, 702 F.2d 388, 390 (2nd Cir. 1983), the court reiterated that holding as follows:

> The district judge recognized that in *Noonan v. Cunnard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967), this court held that mere inadvertence of counsel was not an adequate basis for allowing an untimely filing of a jury trial notice. . . . We do not consign *Noonan* to overruled status. Its holding shall continue to govern cases where it is applicable. *Id.* at 390-393.

In *Daniel Intern. Corp. v. Fischback and Moore, Inc.*, 916 F.2d 1061 (5th Cir. 1990), the defendant made no objection to jury demands made by plaintiff on three occasions, and brought a motion to strike fourteen months after the first jury demand, and only then after the trial was continued on two occasions. One of the jury demands was made by way of a motion which requested a jury demand, and the motion was granted in its entirety without opposition by the defendant. The court also found significant that the case was already on the jury calendar when the motion to strike was brought. Indeed, the Fifth Circuit confirmed the law of the Fifth Circuit as follows:

> This analysis should not be construed as departing from our rule that the movant's "mere inadvertence" in not making a timely demand under Rule 38 provides no justification for invoking Rule 39(b). *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 396 (5th Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970); *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651, 654 (5th Cir. 1984).

In *Merrit v. Faulkner*, 697 F.2d 761 (7th Cir. 1983), the court noted with approval the substantial case law holding that inadvertence of counsel is not enough to support a Rule 39(b) motion. *Id.* at 767. The court then distinguished those cases as follows:

> But this is not a case of mere inadvertence of counsel. This motion was made by a blind *pro se* litigant who indicated from his first pleadings, through his requests for counsel, that he did not feel competent to represent himself in court.

Id. at 767.

The case of *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980) supports the denial of a jury in this case. The court affirmed the district court's denial of a late jury demand where the pro se plaintiff offered no justification for his late request other than lack of experience.

In *Nissan Corp. in U.S.A. v. Burciaga*, 982 F.2d 408 (10th Cir. 1992), the court denied a writ of mandamus to compel the district court to grant its late request for a jury trial. In so deciding, the court explained that the plaintiff offered no excuse other than inadvertence or oversight, and its mistaken belief that the other party had requested a jury.

In *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), the plaintiff failed to even state a reason for her failure to file a timely Rule 38(b) request for jury. Citing several cases holding that a failure due to mere inadvertence is not a basis for reversal of a trial court's denial of a Rule 39(b) motion, the denial of the jury request was affirmed.

The facts in *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987) and *Malbon v. Pennsylvania Millers Mutual Ins. Co.*, 636 F.2d 936 (4th Cir. 1980) were identical to one another. The defendants who removed the cases to federal court had the responsibility for making out the civil cover sheet and mistakenly designated the case as one to be tried to a jury. The courts observed that the plaintiff was lulled into a false sense of security by the defendant's error, excusing the late filing of a demand. Moreover, the court in both instances affirmed the district court's decision on the jury issue after the case was tried on that basis.

Unlike this case, the court in *Ketchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) was asked to reverse the granting of a jury trial. The court noted in its analysis that:

> Generally, a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is "mere inadvertence." *Misco*, 784 F.2d at 205.

Ketchen, 825 F.2d at 1013.

The court in *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965), reversed the district court's denial of a jury trial. However, in that case, both parties had stipulated to and requested a jury trial, the judge had approved the stipulation, and the judge vacated its prior

order for jury trial on the eve of trial on the basis of his own motion. Inadvertence of counsel was not at issue.

Whether the Court looks to well-established case law within the Ninth Circuit or case law in other circuits, the result is the same. Inadvertence or oversight of counsel is simply not a sustainable basis for granting relief from an untimely jury demand in any of the eleven circuits.

CONCLUSION

Petitioner has failed to articulate an issue appropriate for this Court's review. There is no conflict among the federal circuits on the issue, the Ninth Circuit's rule is in accordance with the Supreme Court's precedents and the issue is not of a great importance that would have significant practical consequences, but rather is limited to the facts of this case. The Writ of Certiorari should be denied.

Respectfully submitted,

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